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Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED STATES OF AMERICA, PETITIONER

*v.*

AFRO-AMERICAN POLICE ASSOCIATION, INC., ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

Whether a remedial decree in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, may award preferences in hiring based solely on race, ethnic background, or sex to persons who are not actual victims of the employer's discrimination.

## PARTIES TO THE PROCEEDINGS

The parties to these proceedings are identified in the petition for a writ of certiorari, No. 85-1085 (at ii) filed by the Afro-American Police Association, Inc., et al., plaintiff-intervenors in the instant case.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Reasons for granting the petition | 5 |
| Conclusion | 8 |
| Appendix | 1a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *EEOC* v. *Local 638*, 753 F.2d 1172, cert. granted *sub nom. Local 28, Sheet Metal Workers' International Association* v. *EEOC*, No. 84-1656 (Oct. 7, 1985) | 4, 5 |
| *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984) | 3, 5 |
| *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999 (Oct. 7, 1985) | 5 |
| *Wygant* v. *Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985) | 5 |


Constitution and statutes:


| | |
|---|---|
| U.S. Const. Amend. XIV | 2 |
| Equal Protection Clause | 5, 6 |
| Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* | 2, 5 |
| § 706(g), 42 U.S.C. 2000e-5(g) | 2, 4, 5 |


Miscellaneous:


| | |
|---|---|
| Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (1978) | 3 |

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.[1]

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6)[2] is reported at 779 F.2d 881. The opinion of

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[1] Although respondents Afro-American Police Association, Inc., et al., were prevailing parties in the court of appeals, they have filed a petition for a writ of certiorari (No. 85-1085) to review the Second Circuit's decision. We are filing simultaneously with our petition a memorandum in opposition to respondents' petition.

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-1085, filed by the Afro-American Police Association, Inc., et al., plaintiff-intervenors below.

the district court (Pet. App. B1-B4) is reported at 609 F. Supp. 1252.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, 1a-2a) was entered on December 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), provides in pertinent part:

> No order of the court shall require * * * the hiring * * * of an individual as an employee * * * if such individual * * * was refused employment * * * for any reason other than discrimination on account of race, color, religion, sex, or national origin * * *.

## STATEMENT

1. The United States filed suit against the Buffalo Police Department in 1973, alleging a pattern or practice of discrimination based upon race, sex, and national origin against blacks, women, and Spanish-surnamed Americans, in violation of Title VII of the Civil Rights Act of 1964, other federal statutes, and the Fourteenth Amendment. In 1974, the United States filed a similar action against the Buffalo Fire Department.

The cases were consolidated and, following a trial on the merits, the United States District Court for the Western District of New York found that the City had violated Title VII by unlawfully discriminating against minority and female applicants for police and firefighter positions (Pet. App. D1-D45). The court entered a final decree on November 23, 1979 (*id.* at

E1-E10), requiring the City, among other things, to adopt and seek to achieve "interim goal[s]" of making 50% of all police officer and firefighter appointments from among qualified black and Spanish-surnamed applicants (*id.* at E2). These hiring goals were to remain in effect until the minority composition of the uniformed personnel of the police and fire departments at least equaled the percentage of minorities in Buffalo's labor force or until the selection procedures for these positions were validated in accordance with the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (1978) (Pet. App. E2-E3).[3] The decree also established a similar 25% hiring goal for women in the police department (*ibid.*). These interim goals were affirmed on appeal (*id.* at C1-C8).

2. On January 30, 1985, the United States moved for modification of the final decree, on the ground that this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), rendered the hiring goals unlawful. The United States argued in its motion and supporting memoranda that *Stotts* prohibits federal courts from including in remedial decrees in Title VII cases employment preferences based on race, national origin, or sex that benefit persons who are not victims of the defendant's unlawful employment practices. The City of Buffalo and a group of white plaintiffs-intervenors[4] supported our motion; several other minority and fe-

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[3] Neither condition has been met.

[4] William Blake, et al. In its memorandum to the district court of April 22, 1985 (at 4, 5), this group urged the court to delete "at least temporarily" those portions of the decree providing for quotas and goals.

male plaintiffs-intervenors [5] and an amicus curiae [6] opposed it.

On June 5, 1985, after a hearing on the United States' motion to modify the decree, the district court entered an opinion and order denying the motion (Pet. App. B1-B4), holding that the Second Circuit's rejection of our interpretation of *Stotts* in *EEOC* v. *Local 638*, 753 F.2d 1172 (1985), cert. granted *sub nom. Local 28, Sheet Metal Workers' International Association* v. *EEOC*, No. 84-1656 (Oct. 7, 1985), was binding (as we had conceded) and correct (Pet. App. B3-B4).

3. On August 5, 1985, the United States filed a timely notice of appeal.[7] On December 19, 1985, the court of appeals affirmed, concluding, as it had in *Local 638*, that "race-conscious" relief was available under Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), and consistent with this Court's decision in *Stotts* because "(1) the remedy did not conflict with a bona fide seniority plan protected by § 703(h) of Title VII, (2) the remedy provided prospective rather than 'make-whole' relief, and (3) the remedy was based on the district court's finding of intentional discrimination rather than on a consent decree" (Pet. App. A4 (citing *Local 638*, 753 F.2d at 1186)).

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[5] The National Association for the Advancement of Colored People, Inc., et al.; Sherman Abdallah, et al.; and the Afro-American Police Association, Inc., et al.

[6] The Puerto Rican Legal Defense and Education Fund, Inc.

[7] The United States was the only party to appeal.

## REASONS FOR GRANTING THE PETITION

This case presents a question of substantial and recurring importance regarding the limitations upon the remedial authority of the federal courts in litigation brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* At issue here is the validity of hiring preferences based on race, ethnic background, and sex accorded to individuals who have not been identified as actual victims of discrimination at the expense of innocent third parties. Because this Court has agreed to hear two cases raising this issue this term—one of which the court of appeals in this case relied on as controlling (Pet. App. A2-A3, A4)—we suggest that this petition for certiorari be held pending disposition of those cases.

1. This Court discussed the limitations that Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), imposes upon a court's remedial authority in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984). This petition seeks review of one of a series of recent lower court decisions upholding quota relief and giving the Court's decision in *Stotts* what we regard as an overly narrow and improper interpretation. The Court has recently agreed to hear two of those cases, *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999 (Oct. 7, 1985), and *Local 28, Sheet Metal Workers' International Association* v. *EEOC*, cert. granted, No. 84-1656 (Oct. 7, 1985). Also pending before the Court is a case challenging the validity under the Equal Protection Clause of a similar (racial) preference scheme, *Wygant* v. *Jackson Board of Education*, cert. granted, No. 84-1340 (Apr. 15, 1985). The views of the United States as to the validity of such racial preferences under Title

VII and under the Equal Protection Clause have been expressed in a brief as amicus curiae supporting the petitioner in *Local 93* (at 6-30); in a brief on behalf of the EEOC in *Local 28* (at 23-39); in a brief as amicus curiae supporting petitioners in *Wygant* (at 6-30); in our petitions for certiorari in *Orr* v. *Turner*, No. 85-177 (filed July 31, 1985) (involving statutory and constitutional challenges to a racially preferential consent decree) (at 12-25), and *United States* v. *Paradise*, No. 85-999 (filed Dec. 10, 1985) (involving a racial preference imposed on nonconsenting parties as part of a court order purporting to enforce earlier decrees entered by consent) (at 9-14); and in a brief as amicus curiae supporting certiorari in *Devereaux* v. *Geary*, No. 85-492 (filed Oct. 23, 1985) (involving statutory and constitutional challenges to a racially preferential consent decree).

The instant case presents questions similar to those raised in *Local 93* and *Local 28*. In *Local 93*, petitioner challenges a racial preference incorporated in a Title VII consent judgment; in *Local 28*, another Title VII case, the racial preference was, as in this case, awarded after trial. The decisions in *Local 93* and *Local 28* are likely to provide substantial clarification of the principles bearing on resolution of the question presented in this petition, so that a remand after this Court has decided these cases is likely to be merited. Alternatively, this case itself may provide the Court with an opportunity for further clarification of those principles in the wake of its decisions in the cases it has already agreed to hear. Accordingly, we suggest that the Court hold this petition pending disposition of *Local 93* and *Local 28*.

2. We do not repeat the discussion of the Title VII question contained in our filings in *Local 93* and *Local*

*28*,[8] and add only the following observations pertaining to this case. As noted earlier, the court of appeals, relying upon its prior decision in *Local 28*, attempted to distinguish *Stotts* on three grounds. Regarding the first "distinction," our briefs in *Local 93* (at 17-18) and *Local 28* (at 27) respond to the court of appeals' argument that *Stotts* does not apply unless seniority rights are abridged. Second, as we discuss in our brief in *Local 28* (at 27-29), the court of appeals erred in holding that *Stotts* does not apply to "prospective," class-based relief as opposed to retrospective, make-whole relief. Third, the fact that the district court here, unlike the district court in *Stotts*, predicated its order on findings of past intentional discrimination is plainly beside the point, as we discuss in our brief in *Local 28* (at 29-30). Section 706(g) broadly governs *all* relief entered in Title VII cases. Nothing in Title VII, in *Stotts*, or in any other decision of this Court even remotely suggests that the remedial power of a Title VII court differs depending upon whether the discrimination is intentional.

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[8] We have served copies of these filings on counsel for each of the other parties to the proceedings below.

## CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of *Local 93* and *Local 28*.

Respectfully submitted.

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FEBRUARY 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of December one thousand nine hundred and eighty-five.

Present:

HONORABLE WILFRED FEINBERG, Chief Judge,

HONORABLE WALTER R. MANSFIELD,

HONORABLE JAMES L. OAKES,
Circuit Judges,

[Filed Dec. 19, 1985]

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Docket No. 85-6212

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*—against—*

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ELIJAH FEASTER, MARIA FULLER, BEVERLY JOHNSON, DARWIN JONES, DORIS LEWIS, DAVID MALONE, ROBERT MIDDLEBROOKS,

HARRISON MULLEN, WILLIAM STENSON, WILLIAM WESTBROOK and NATHANIEL WRIGHT,

SHERMAN ABDALLAH, RICHARD CRUZ, MARILYN MACK, JOANNE RIZZO, CHRISTINE SALAMONE, DEIDRE WALLACE and GWENDOLYN WILLIAMS,

WILLIAM BLAKE, JOSEPH CONIGLIO, CINDY DIEM, CHARLES FLYNN, JAMES HOWE, DON JUST, JAMES P. KENNEDY, MICHAEL J. KRZEMINSKI, TIMOTHY MCDONALD, MAUREEN OAKLEY, PATRICK S. O'MARA, PAUL SKINNER, KEVIN VEITH, THOMAS VIVIAN, RONALD ZAPRZAL and TARAS ZNACZKO,

AFRO-AMERICAN POLICE ASSOCIATION, INC., DANNY WILLIAMS, JOHN DUBLIN, JOHN CLARENCE EBERHART, TIMOTHY IRVING BALDON, MARK ANTHONY RICE and VERNON KEITH BEATY, PLAINTIFFS-INTERVENORS-APPELEES

*—against—*

CITY OF BUFFALO, A Municipal Corporation, and COUNTY OF ERIE, DEFENDANTS-APPELLEES

---

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*—against—*

CITY OF BUFFALO, A Muncipal Corporation, DEFENDANT-APPELLEE

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Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the ORDER of said District Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro
By: EDWARD J. GUARDARO
Deputy Clerk

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UNITED STATES OF AMERICA,
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*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF OF THE AFRO-AMERICAN POLICE ASSOCIATION, INC., *et al.*, IN RESPONSE TO THE UNITED STATES' PETITION FOR A WRIT OF CERTIORARI

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March 12, 1986.

No. 85-1404

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## BRIEF OF THE AFRO-AMERICAN POLICE ASSOCIATION, INC., *et al.*, IN RESPONSE TO THE UNITED STATES' PETITION FOR A WRIT OF CERTIORARI

Whether this Court should hear this case, either on the petition of the United States or on our petition, depends largely, if not entirely, on whether the Court's forthcoming decisions in *Local 28 of the Sheet Metal Workers v. EEOC,* No. 84-1656, and *Local 93, International Association of Firefighters v. City of Cleveland,* No. 84-1999, will substantially resolve the issue presented here. Both of those cases have now been argued and are *sub judice.*

As we said in our own petition,[1] the issue presented in this case is an important one. The United States has taken the position in this case, and has announced its intention to take the same position in 50 other cases around the country, that prospective race-conscious relief benefitting persons who were not proven victims of discrimination, is unlawful. Although

[1] In order to give this Court the option to consolidate this case with *Local 28* and *Local 93,* we filed a petition, as permitted by 28 U.S.C. § 1254(1) (1982), for a writ of certiorari even though we prevailed in the court of appeals.

every court of appeals to have considered that question has decided otherwise, the United States is apparently intent on pressing its position in the lower courts until it receives a definitive decision from this Court. Indeed, although we have prevailed at every stage of this litigation, there is no reason to believe that the United States will not continue to question the lawfulness of the Buffalo decree or that it will affirmatively seek to enforce it, until this Court explicitly decides whether that decree is lawful.

Unlike *Local 28,* where the order before the Court is a contempt citation that does not directly raise the issue of the lawfulness of prospective race-conscious relief, this case squarely presents that issue. The Department of Justice brought this suit in 1973. After a full trial on the merits, and after findings of intentional discrimination, the Department sought and obtained an order containing such prospective relief and defended that order in the court of appeals in 1980. In 1985, however, the Department returned to the district court contending that such relief is unlawful.

We believe that this Court should now decide the question presented here, whether in this case or in some other case. For that reason, we acquiesce in the United States' petition and leave it to the Court to decide whether further briefing and oral argument would be helpful.

March 12, 1986.

Respectfully submitted,

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